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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

321 STUDIOS, also known as 321 Studio,
LLC,

Plaintiff,

v.

METRO-GOLDWYN-MAYER STUDIOS
INC.; TRISTAR PICTURES, INC.;
COLUMBIA PICTURES INDUSTRIES,
INC.; SONY PICTURES
ENTERTAINMENT, INC.; TIME
WARNER ENTERTAINMENT CO. L.P.;
DISNEY ENTERPRISES, INC.;
UNIVERSAL CITY STUDIOS, INC.; and
THE SAUL ZAENTZ COMPANY,

Defendants.

METRO-GOLDWYN-MAYER STUDIOS
INC.; TRISTAR PICTURES, INC.;
COLUMBIA PICTURES INDUSTRIES,
INC.; TIME WARNER ENTERTAINMENT
COMPANY, L.P.; DISNEY ENTERPRISES,
INC.; THE SAUL ZAENTZ COMPANY;
and UNIVERSAL CITY STUDIOS LLLP,
formerly known as UNIVERSAL CITY
STUDIOS, INC.

Counterclaimants,

Case No.: C-02-1955 SI

**NOTICE OF MOTION AND MOTION
OF DEFENDANTS AND
COUNTERCLAIMANTS FOR PARTIAL
SUMMARY JUDGMENT**

Date: Friday, February 28, 2003

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: The Honorable Susan Illston

1 v.

2 321 STUDIOS, also known as 321 Studio,
3 LLC.; ROBERT MOORE, an individual;
4 ROBERT SEMAAN, an individual; and
5 VICTOR MATTISON, an individual,

6 Counterclaim Defendants.

7 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

8

9 **PLEASE TAKE NOTICE** that on February 28, 2003 at 9:00 a.m., or as soon thereafter
10 as the matter may be heard before the Honorable Susan Illston, United States District Judge, in
11 Courtroom 10 on the 19th Floor, 450 Golden Gate Avenue, San Francisco, California.
12 Defendants and Counterclaimants Metro Goldwyn-Mayer Studios Inc., TriStar Pictures, Inc.,
13 Columbia Pictures Industries, Inc., Sony Pictures Entertainment Inc., Time Warner
14 Entertainment Co. L.P., Disney Enterprises, Inc., Universal City Studios LLLP, formerly known
15 as Universal City Studios, Inc., and The Saul Zaentz Company ("the Studios") will and hereby
16 do move for summary adjudication in favor of the Studios and against Plaintiff/Counterclaim
17 Defendant 321 Studios ("321") on 321's First Claim (Declaratory Relief under the DMCA, 17
18 U.S.C. Section 1201 *et seq.*), for summary adjudication that 321 is liable on the Studio's
19 Counterclaim (violation of the DMCA, 17 U.S.C. § 1201), and for an order dismissing as moot
20 321's Second Claim (Declaratory Relief, Direct, Vicarious or Contributory Infringement, [1]7
21 U.S.C. Section 101 *et seq.*).
22

23 The Studios seek an order adjudicating (1) that 321 is not entitled to a declaratory
24 judgment that its products DVD Copy Plus and DVD-X Copy are legal under 17 U.S.C. § 1201
25 and is not entitled to a declaratory judgment that the DMCA is invalid or unconstitutional, (2)
26 that 321 is liable for violation of Section 17 U.S.C., and (3) dismissing 321's Second Claim for
27 Relief as moot.
28

1 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points
2 and Authorities and Declarations of Robert W. Schumann and Marc E. Mayer served and filed
3 concurrently herewith, on the pleadings and records on file in this action, and on such other
4 argument and evidence as may be presented to this Court at or before the hearing on this
5 Motion.

DATED: January 10, 2003

RUSSELL J. FRACKMAN
PATRICIA H. BENSON
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By:

Russell J. Frackman
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TABLE OF CONTENTS

		<u>Page</u>	
1	I.	STATEMENT OF THE ISSUES.....	2
2	II.	STATEMENT OF UNDISPUTED BACKGROUND FACTS.....	2
3	A.	The Studios and DVD Technology.....	2
4	B.	“CSS” And DVD Anti-Piracy Technology.....	3
5	C.	The DMCA Anti-Circumvention Provisions.....	5
6	D.	“DeCSS” and the <i>Corley</i> Litigation.....	6
7	E.	321 and The DVD Circumvention Software	7
8	F.	321’s Admissions That Its Software Circumvents CSS Technology	8
9	G.	The Current Litigation	9
10	H.	The Elcom Litigation	10
11	III.	THE LEGAL STANDARD.....	10
12	IV.	321 IS LIABLE UNDER THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA.....	11
13	V.	THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA ARE NOT INVALID OR UNCONSTITUTIONAL.....	15
14	A.	Congress Did Not Exceed Its Constitutional Power in Enacting the DMCA.....	16
15	B.	The DMCA Does Not Conflict With Or Otherwise Eliminate Fair Use	18
16	C.	Section 1201 Does Not Violate the First Amendment.....	20
17	1.	The DMCA Is Content-Neutral	20
18	2.	The DMCA Promotes Substantial Governmental Interests And Is Tailored To Further Those Interests	22
19	D.	Section 1201 Is Not Unconstitutionally Vague	23
20	VI.	321 SHOULD BE ENJOINED FROM MANUFACTURING, DISTRIBUTING, OR OTHERWISE TRAFFICKING IN THE DVD CIRCUMVENTION SOFTWARE	24
21	CONCLUSION.....		25

TABLE OF AUTHORITIES

CASES

4	<u>Celotex Corp. v. Catrett</u> ,	477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	10
5	<u>Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.</u> ,	896 F.2d 1542 (9th Cir. 1990)	2
6	<u>Posters 'N' Things, Ltd. v. United States</u> ,	511 U.S. 513 (1994).....	24
7	<u>Preiser v. Newkirk</u> ,	422 U.S. 395 (1975).....	2
8	<u>RealNetworks, Inc. v. Streambox, Inc.</u> ,	Case No. 2:99-CV-02070, 2000 WL 127311 (W.D. Wash., Jan. 18, 2000).....	13, 14
9	<u>Richmond Boro Gun Club, Inc. v. City of New York</u> ,	97 F.3d 681 (2d Cir. 1996).....	24
10	<u>Sable Communications of California, Inc. v. FCC</u> ,	492 U.S. 115 (1989).....	20
11	<u>Sony Computer Entertainment America Inc. v. GameMasters</u> ,	87 F. Supp. 2d 976 (N.D. Cal. 1999)	14
12	<u>Turner Broad. System, Inc., v. FCC</u>	520 U.S. 180 (1997).....	18
13	<u>Turner Broadcasting System, Inc. v. FCC</u> ,	512 U.S. 622 (1994).....	20, 22
14	<u>U.S. v. Lopez</u> ,	514 U.S. 549 (1995).....	17, 18
15	<u>United States v. Elcom, Ltd.</u> ,	203 F. Supp. 2d 1111 (N.D. Cal. 2002)	2, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24
16	<u>United States v. Moghadam</u> ,	175 F.3d 1269 (11th Cir. 1999)	17, 18
17	<u>Universal City Studios, Inc. v. Corley</u> ,	273 F.3d 429 (2d Cir. 2001).....	1, 5, 6, 7, 8, 16, 19, 20, 21, 22, 23
18	<u>Universal City Studios, Inc. v. Reimerdes</u> ,	82 F. Supp. 2d 211 (S.D.N.Y. 2000).....	1, 3, 4, 6, 7, 8, 12, 13, 14, 15, 21, 24, 25

<u>Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.</u> , 455 U.S. 489 (1982).....	24
<u>Woods v. Cloyd W. Miller Co.</u> , 333 U.S. 138 (1948).....	18
STATUTES	
17 U.S.C. §106.....	13
17 U.S.C. §107	15
17 U.S.C. § 1201 et seq.....	1, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24
18 U.S.C. § 2319A.....	17
37 CFR Part 201, 65 Fed. Reg. 64556-01, at 64561	15, 19, 20, 25
47 U.S.C. § 553(a)(2).....	16
MISCELLANEOUS	
H.R. Rep. No. 105-551(I), at 17 (1998).....	11
S. Rep. No. 105-190, at 10 (1998)	5, 6, 12, 16, 18, 23
I. Ballon, E-Commerce and Internet Law (2001)	15
M. & D. Nimmer, Nimmer On Copyright (2001).....	5, 11

Introductory Statement

2 The action filed by Plaintiff/Counterclaim Defendant 321 Studios, LLC. ("321") is the
3 most recent in a series of unsuccessful challenges to the anti-circumvention provisions of the
4 Digital Millennium Copyright Act ("DMCA"). The DMCA expressly and unambiguously
5 prohibits trafficking in "any technology, or product...or part thereof," that primarily is designed
6 to circumvent any access-control or other technological measures implemented by a copyright
7 holder to protect its rights in its copyrighted works, including the exclusive right to copy. 17
8 U.S.C. §§1201(a) and 1201(b). In violation of the DMCA, 321 is trafficking in software
9 designed *expressly* to circumvent the access-control and copy-prevention system incorporated
10 into the DVDs containing copyrighted motion pictures that are commercially released by
11 Defendants/Counterclaimants (the "Studios").

12 In its claim for declaratory relief, 321 concedes that the software it distributes is designed
13 to permit the copying of the Studios' encrypted copyrighted motion pictures on DVDs. FAC ¶¶
14 1, 23, 26, 28, 29. By that concession, 321 necessarily admits that its software is designed to
15 circumvent the encryption protection embedded in those DVDs. Thus, *the* material fact
16 necessary to decide both 321's challenge to section 1201 and the Studios' counterclaim for
17 violation of section 1201 is undisputed. No discovery on this dispositive issue is necessary.
18 Therefore, in the interests of economy and efficiency, the Studios move for summary
19 adjudication of 321's First Claim for Declaratory Relief Under the DMCA and of the Studios'
20 Counterclaim for violation of section 1201.

21 The legal issues involved – the validity and applicability of the DMCA – previously have
22 been analyzed and decided in two cases. 321, which is based in Missouri, filed this declaratory
23 relief action after the Second Circuit, affirming the District Court's judgment in a lawsuit brought
24 by most of the same motion picture studios that are Defendants and Counterclaimants in this
25 case, had flatly rejected, in a highly-publicized opinion, the precise arguments 321 advances
26 here. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001), aff'd, Universal City
27 Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000). Forum shopping in no way has
28 improved 321's arguments, however. After this case was filed, a third court, in this district, also

1 rejected the same Constitutional challenges that 321 raises here. United States v. Elcom, Ltd.,
 2 203 F. Supp.2d 1111 (N.D. Cal. 2002) (Whyte, J.)

3 If the Court determines that 321's products violate the anti-circumvention provisions of
 4 the DMCA, then 321 must stop distributing those products (and will be liable for damages).
 5 Therefore, there will not be any current, judiciable controversy as to whether, by selling its
 6 circumvention products, 321 also is liable for copyright infringement – which is the issue raised
 7 in 321's Second Claim for Declaratory Relief – and that claim will be moot. Hal Roach Studios,
 8 Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555-56 (9th Cir. 1990) (request for
 9 declaration of non-infringement presents an actual case or controversy "if the plaintiff has a real
 10 and reasonable apprehension that he will be subject to liability [for infringement] if he continues
 11 to manufacture his product"); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("[A]n actual
 12 controversy must be extant at all stages of review, not merely at the time the complaint is filed").
 13 Accordingly, 321's Second Claim would be dismissed as moot. ATMI, Inc. v. Innovative
 14 Engineering Solutions, Inc., 2002 WL 826794 at *1 (N.D. Cal. 2002) (Illston, J.) (granting
 15 plaintiff partial summary judgment on its claim for declaratory judgment that defendant did not
 16 own certain patents, and dismissing as moot plaintiff's claim for declaratory judgment that it did
 17 not infringe those patents).

18 **I. STATEMENT OF THE ISSUES**

19 1. Does the manufacture and trafficking in software that circumvents copying and
 20 access control measures violate the "anti-circumvention" provisions of the DMCA?

21 2. Are the DMCA's anti-circumvention provisions unconstitutional?

22
 23 **II. STATEMENT OF UNDISPUTED BACKGROUND FACTS¹**

24 A. The Studios and DVD Technology

25 The Studios, directly or through affiliates, are engaged in the business of producing and
 26 distributing motion pictures and other copyrighted works. FAC ¶5; AC ¶ 5. The Studios

27
 28 ¹ The facts derived from 321's First Amended Complaint ("FAC") and Answer to
 Counterclaim ("AC") are assumed to be true for purposes of this Motion only.

1 distribute motion pictures theatrically, by television transmission, and on portable media, such as
 2 videocassette tapes and DVDs (an acronym for “Digital Versatile Discs”). FAC ¶ 5, 19;
 3 Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

4 A DVD is a digital storage medium, similar in shape and size to the “compact disc”
 5 (“CD”) medium that is used for the storage of audio files. FAC ¶ 19; Declaration of Robert W.
 6 Schumann (“Schumann Decl.”), ¶ 7. Because a DVD is capable of storing several times the
 7 amount of data that can be stored on a CD, DVDs are used to store the digital video and audio
 8 information that comprises a full-length motion picture (or other audiovisual work). FAC 19;
 9 Schumann Decl., ¶¶ 8-9; Reimerdes, 111 F. Supp. 2d at 307. DVDs can be viewed either on a
 10 television equipped with a stand-alone DVD player or on a computer with a DVD-Rom and
 11 specialized playback software (“DVD Player” software). FAC ¶ 20; Schumann Decl., ¶ 9.
 12 DVDs are the latest technology for private home viewing of recorded motion pictures, and
 13 provide a significant improvement on audio and visual quality as compared to video cassette
 14 tapes. FAC ¶ 20; Reimerdes, 111 F. Supp. 2d at 307; Schumann Decl. ¶ 10.

15 B. “CSS” And DVD Anti-Piracy Technology

16 DVDs distributed by the Studios are protected by a technology known as “Content
 17 Scramble System,” or “CSS.” The development of CSS was explained in Reimerdes:

18 “Motion pictures first were, and still are, distributed to the home
 19 market in the form of video cassette tapes. In the early 1990’s,
 20 however, the major movie studios began to explore distribution to
 21 the home market in digital format, which offered substantially
 22 higher audio and visual quality and greater longevity than video
 23 cassette tapes. This technology, which in 1995 became what is
 24 known as DVD, brought with it a new problem – increased risk of
 25 piracy by virtue of the fact that digital files, unlike the material on
 26 video cassettes, can be copied without degradation from
 27 generation to generation. . . . Discussions among the studios with
 28 the goal of organizing a unified response to the piracy threat
 began in earnest in late 1995 or early 1996. . . . In 1996,
 Matsushita Electric Industrial Co. and Toshiba Corp. presented –
 and the studios adopted – CSS.” Reimerdes, 111 F. Supp. 2d at
 309.

27
 28 See also Schumann Decl., ¶ 11-12.

1 CSS is an integrated system of access "locks," encryption technology and licensing
 2 provisions that protect the contents of a DVD from unauthorized access and copying.
 3 Reimerdes, 111 F. Supp. 2d at 309-10; Schumann Decl., ¶ 14. 321 accurately summarizes the
 4 encryption elements of CSS:

5 "Most DVDs manufactured, distributed or sold by the [Studios] are
 6 recorded onto the DVD in a scrambled format in which the data is
 7 encrypted in order to prevent unauthorized access to the data
 8 contained on the DVD. . . . [The Studios] have adopted CSS as a
 9 standard encryption technique to prevent access to DVD data. CSS
 10 works by scrambling the digital data that makes up each frame of
 11 video images. The CSS standard, as well as the licensing of the
 12 electronic encryption 'keys' necessary to play back the DVDs, is
 13 administered by an organization known as the Copyright Control
 14 Authority (CCA). The CSS 'keys' are licensed to the makers of
 15 DVD players and DVD software. A CSS-protected DVD can only
 16 be played back or viewed by DVD players or computer software
 17 which contain the 'keys' licensed by the CCA, either directly or
 18 through subcontracts. When the CSS-encrypted DVD is placed in
 19 a licensed DVD player, the DVD player uses software and
 20 electronic decryption 'keys' in order to unscramble the data and
 21 display the frames that make up the video images." FAC ¶23.

22 CSS also has a "locking" mechanism so that the computer's DVD drive will not allow
 23 access to a DVD's content until it confirms that the DVD player software seeking access is an
 24 authentic, CCA-licensed player. Schumann Decl. ¶ 15. The CSS locking mechanism and
 25 encryption are independent and complementary protections. Id., ¶ 14, 16. Only players and
 26 drives equipped with both the proper authentication credentials and the necessary "keys" are able
 27 to access and decrypt CSS-encrypted DVD files and thereby play the motion pictures stored on
 28 DVDs. Id., ¶¶ 16-20. In order to ensure that CSS decryption technology (1) would not become
 generally available, and (2) would only be used to play – and not to copy – DVDs, CCA licenses
 CSS subject to strict requirements, including that authorized DVD players not permit copying.
Id., ¶ 14; Reimerdes, 111 F.Supp. 2d at 310. As a result of CSS and the CCA licensing
 procedures, DVDs encrypted with CSS cannot be accessed (played) on noncompliant players and
 cannot be digitally copied (including on a personal computer) unless CSS protection is
 circumvented. Id. ¶ 21.

1 C. The DMCA Anti-Circumvention Provisions

2 Congress enacted the DMCA in 1998. (It is codified in the Copyright Act at 17 U.S.C.
 3 §§1201 et seq.). A key element of the digital protection enacted as part of the DMCA was to
 4 “provide 'legal protection and effective legal remedies' against circumventing technological
 5 measures, e.g., encryption and password protection, that are used by copyright owners to protect
 6 their works from piracy” S. Rep. No. 105-190, at 10 (1998); see also Corley, 273 F.3d at
 7 440. Congress considered this protection to be critical so that copyrighted works could be
 8 offered to the public in digital formats without the substantial risk of wholesale, high-tech
 9 infringement:

10 “When copyrighted material is adequately protected in the digital
 11 environment, a plethora of works will be distributed and
 12 performed.... In order to protect the owner, copyrighted works
 13 will most likely be encrypted and made available to consumers
 14 once payment is made for access to a copy of the work. There will
 15 be those who will try to profit from the works of others by
 16 decoding the encrypted codes protecting copyrighted works, or
 17 engaging in the business of providing devices or services to enable
 18 others to do so.” H. Rep. No. 105-511(I), p. 10 (1998).

19 See also 3 M. & D. Nimmer, Nimmer On Copyright § 12A.03 at 12A-14 (2001) (hereafter
 20 “Nimmer”) (section 1201 is “first not only in order and length [of the DMCA sections], but in
 21 importance as well.”)

22 The approach Congress adopted was to “import[] into the online environment the same
 23 sensitivities that Congress previously brought to bear ‘in the areas of cable television and
 24 satellite transmissions to prevent unauthorized interception and descrambling of signals.’” 3
 25 Nimmer, § 12A.03, at 12A-14, quoting H. Rep. No. 105-511(I), at 10.

26 “The Copyright Act in section 1002(c) already protects sound
 27 recordings and musical works by prohibiting devices which
 28 circumvent any program or circuit that implements a serial copy
 29 management system or similar system included in digital audio
 30 recording devices and digital audio interface devices. The
 31 Communications Act in section 605(e)(4) prohibits devices that are
 32 ‘primarily of assistance in the unauthorized decryption of satellite
 33 cable programming.’” S. Rep. No. 105-190 at 11.

34 Two key provisions of the DMCA prohibit trafficking in technology that circumvents
 35 copyright protection systems such as CSS. Corley, 273 F.3d at 440. First, 17 U.S.C.
 36

1 §1201(a)(2) prohibits the “manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or
 2 otherwise traffic[ing]” in technology or products designed to circumvent a technological
 3 measure that controls *access* to a copyrighted work. Second, 17 U.S.C. 1201(b) prohibits
 4 trafficking in technology or products designed to circumvent “a technological measure that
 5 effectively protects a right of a copyright owner under this title in a work or a portion thereof” –
 6 e.g., *the reproduction right*. S. Rep. No. 105-190 at 12 (“Section 1201(b) is designed to protect
 7 the traditional copyright rights of the copyright owner”). As the Second Circuit explained:

8 “[A]lthough both subsections prohibit trafficking in a
 9 circumvention technology, the focus of subsection 1201(a)(2) is
 10 circumvention of technologies designed to *prevent access* to a
 11 work, and the focus of subsection 1201(b)(1) is circumvention of
 12 technologies designed to *permit access* to a work but *prevent*
 13 *copying* of the work or some other act that infringes a copyright.”
Corley, 273 F.3d at 441 (emphasis in original) (citing S. Rep. No.
 14 105-190, at 11-12).

15 **D. “DeCSS” and the *Corley* Litigation**

16 Around 1999, a software utility known as “DeCSS” appeared on the Internet.
 17 (Presumably, the first syllable refers to the program's ability to “de-scramble” or “de-crypt”
 18 CSS). Schumann Decl., ¶ 22. “If a user runs the DeCSS program . . . with a DVD in the
 19 computer's disk drive, DeCSS will decrypt the DVD's CSS protection, allowing the user to copy
 20 the DVD's files and place the copy on the user's hard drive. The result is a very large computer
 21 file that can be played on a non-CSS-compliant player and copied, manipulated, and transferred
 22 just like any other computer file.” Corley, 273 F.3d at 437-38; Schumann Decl., ¶¶ 23-24. See
 23 also FAC ¶25 (DeCSS is a “piece of software which descrambles DVD data encrypted by CSS,
 24 permitting the access and playback of legitimately owned DVD videos on computers not
 25 equipped with the CSS encryption keys”). The quality of the resulting decrypted movie is
 “virtually identical” to that of the encrypted movie on the original DVD. Corley, 273 F.3d at
 438; Schumann Decl. ¶ 23.

26 In January 2000, eight plaintiffs, including some of the Studios, sued a distributor of
 27 DeCSS. Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000). The
 28 District Court issued a preliminary injunction, enjoining the distribution of DeCSS. Id. In a later

1 opinion, the District Court held that by distributing DeCSS, the Defendants violated the
 2 DMCA's anti-circumvention provisions, noting that "[t]here is no serious question that
 3 defendants' posting of DeCSS violates the DMCA." Reimerdes, 111 F. Supp. 2d 294, 304
 4 (S.D.N.Y. 2000). The Court determined that "DeCSS is a free, effective and fast means of
 5 decrypting plaintiffs' DVDs," and that "the availability of DeCSS on the Internet effectively has
 6 compromised plaintiffs' system of copyright protection for DVDs." 111 F. Supp. 2d at 315. The
 7 Second Circuit Court of Appeals affirmed, holding that "DeCSS is computer code that can
 8 decrypt CSS. In its basic function, it is like a skeleton key that can open a locked door, a
 9 combination that can open a safe, or a device that can neutralize the security device attached to a
 10 store's products." Corley, 273 F.3d at 452-53.

11 E. 321 and The DVD Circumvention Software

12 Beginning around August 2001 – after the well-publicized injunction had been issued in
 13 Reimerdes prohibiting the distribution of DeCSS – 321 not only ignored the clear ruling that
 14 distributing a CSS circumvention utility was illegal, but took the concept of DeCSS one step
 15 further by marketing and selling DVD Copy Plus, a software application that bundles a program
 16 that operates in a manner largely identical to DeCSS with other software that then copies the "de-
 17 scrambled" DVD content onto a CD. FAC ¶¶ 26, 29; Schumann Decl. ¶¶ 26-30. In November
 18 2002, 321 began selling a second software product called DVD-X-Copy, which copies the "de-
 19 scrambled" DVD content onto a DVD, rather than a CD. FAC ¶ 28; Schumann Decl. ¶ 31.
 20 ("DVD Copy Plus" and "DVD-X-Copy" collectively are referred to as the "DVD Circumvention
 21 Software").

22 The processes by which 321's DVD circumvention software operates are described in
 23 detail in the Schumann Declaration. Schumann Decl. ¶¶ 25-37. In its basic function, the DVD
 24 Circumvention Software "rips" (copies) a DVD's CSS-protected content onto a computer hard
 25 drive in a de-scrambled form, and then copies (or "burns") that de-scrambled DVD content onto
 26 computer disc. FAC ¶¶ 26, 28. DVD Copy Plus "compresses" the de-scrambled DVD content
 27 on the computer hard drive to a smaller size, and then copies the de-scrambled, compressed

1 content onto a recordable CD. FAC ¶ 26. DVD-X-Copy copies the de-scrambled DVD content
 2 from the hard drive to a recordable DVD, without first compressing the file. FAC ¶ 28.

3 DVD Copy Plus and DVD-X-Copy achieve precisely the same end result as DeCSS, and
 4 in order to do so necessarily circumvent CSS. Schumann Decl. ¶¶ 6, 25-36. Both products
 5 bypass CSS protection by improperly gaining access to the DVD content, causing its decryption,
 6 and depositing a de-scrambled, unprotected copy of the DVD content on the hard drive of the
 7 user's computer. Id. That post-circumvention copy is forever stripped of its CSS protection, and
 8 can be freely viewed (accessed) through unlicensed players, copied (as many times as a user
 9 wishes) or Internet distributed in its unprotected form. Id.

10 The DVD Circumvention Software currently is being marketed, distributed and sold by
 11 321 at retail stores and by mail-order through 321's Internet websites. FAC ¶ 26. Both DVD
 12 Copy Plus and DVD-X-Copy are sold by 321 with instructions and tutorials which explain, step-
 13 by-step, how to use the products to circumvent CSS protection. 321 also provides both live and
 14 Internet technical support for these products, through which purchasers may obtain assistance in
 15 installing and running the DVD Circumvention Software. The instructions for DVD Copy Plus
 16 specifically teach the user how to use the software to “**decode**, store, and rerecord video content
 17 that has been placed on a DVD.” FAC ¶ 29. 321 Studio's DVD Circumvention Software is
 18 marketed as a fast, easy way to copy CSS-protected DVDs. Declaration of Marc E. Mayer
 19 (“Mayer Decl.”), Exs. A, B. Advertising on 321's website promises that DVD-X-Copy will
 20 make “PERFECT COPIES OF YOUR DVDS!...IN ABOUT AN HOUR.” Id. Ex. C.

21 F. 321's Admissions That Its Software Circumvents CSS Technology

22 321 admits that the DVD Copy Plus is designed to circumvent CSS, and that it is either
 23 based on, derived from, or has the same effect as the DeCSS technology that the Corley and
 24 Reimerdes Courts found to have “compromised [the Studios'] system of copyright protection for
 25 DVDs.” Its First Amended Complaint alleges that DVD Copy Plus contains “four freely-
 26 available software components” (including a next generation DeCSS program, Schumann Decl.
 27 ¶ 28), and that its value “lies primarily in the instructions which permit the use of the software”
 28 to “**decode**, store, and rerecord video content that has been placed on a DVD.” FAC ¶ 29. 321

1 confirmed this in a press release: "DVD Copy Plus combines three freeware utilities for
 2 **decoding**, storing and burning the DVD contents with interactive tutorial software developed by
 3 321Studios.com to simplify those highly technical applications for use by anyone with a general
 4 knowledge of Windows." Mayer Decl., Ex. C (emphasis added).

5 321 likewise admits that DVD-X-Copy operates to the same result as DeCSS by
 6 decoding and descrambling the DVD's CSS-protected contents. As one of the programmers of
 7 DVD-X-Copy explained:

8 "The dispute between whether or not DVD XCopy uses deCSS is
 9 more an issue of semantics than substance. When Robert [Moore,
 10 the President of 321] says we don't use DeCSS he is referring to the
 11 source code for DeCSS, about which there was such a flap a year
 12 or so ago. Bottom line is, yes, the software has to descramble the
 13 contents of the DVD in order to do anything useful with it." Mayer
 14 Decl., Ex. E.

15 321's chief executive, Robert Semaan, recently acknowledged that the software is no
 16 different from preexisting CSS-decoding utilities: "People are already making DVD copies,
 17 we're just making it simpler with a click of a button... It's not so earth-shattering from the
 18 technology environment because that stuff already exists. What we're doing is bringing it to the
 19 mass market." Mayer Decl., Ex. D.

20 G. The Current Litigation

21 321's Complaint "asks the Court to confirm its right to distribute and sell DVD Copy Plus
 22 and DVD-X COPY, [and] seek[s] a declaratory judgment that 321 Studios is not violating the
 23 provisions of the Digital Millennium Copyright Act ("DMCA"), that it is not contributorily
 24 infringing any copyright in video works stored in the DVD format, and that its activities are
 25 protected by the First Amendment." FAC ¶ 2. On November 5, 2002, 321 filed a First Amended
 26 Complaint, again asserting two claims for relief: First, without explaining the specifics of its
 27 position, it seeks a declaratory judgment that 321's "activities in distributing DVD Copy Plus and
 28 DVD-X-COPY do not violate the provisions of the DMCA or, in the alternative, that these
 29 provisions are invalid in light of other copyright law provisions, these provisions are invalid
 30 because Congress exceeded its enumerated powers under Article 1, Section 8, of the United
 31 States Constitution, these provisions are unconstitutionally vague, and/or these provisions violate

1 the First Amendment of the Constitution." FAC ¶ 44. Second, it seeks a declaratory judgment
 2 that, by virtue of its sale and distribution of DVD Circumvention Software, it is not liable for
 3 copyright infringement. FAC ¶ 49. On December 19, 2002, the Studios filed an Answer to the
 4 First Amended Complaint and a Counterclaim against 321, asserting violations of section 1201
 5 of the DMCA.

6 H. The Elcom Litigation

7 Less than a month after 321 filed this action, another court in this district addressed many
 8 of the assertions 321 makes here. In United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D.
 9 Cal. 2002) (Whyte, J.), the United States brought a criminal indictment, under section 1201,
 10 against the manufacturer, distributor, and creator of a software program ("AEBPR") that allowed
 11 a user to remove use restrictions from encoded electronic books ("eBooks") formatted for use
 12 only on a particular software application, the Adobe eBook Reader. Use of AEBPR, precisely
 13 like the DVD Circumvention Software, causes "the restrictions imposed by the publisher [to be]
 14 stripped away, leaving the eBook in a 'naked PDF' format that is readily copyable, printable, and
 15 easily distributed electronically." 203 F. Supp. at 1118. Like 321 in this case, Defendant Elcom
 16 argued that the DMCA anti-circumvention provisions are unconstitutionally vague, exceed
 17 Congress' enumerated powers, and violate its First Amendment rights. The Court considered
 18 and rejected each of these assertions. Id.²

19

20 III. THE LEGAL STANDARD

21 A party seeking summary judgment has the initial burden of "informing the district court
 22 of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers
 23 to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes
 24 demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S.
 25

26 ² In December 2002, the jury acquitted Elcom of criminal violation of section 1201. The
 27 jury found that although Elcom's product was unlawful, it did not intend to violate the law. That
 28 verdict has no bearing here, because criminal intent is not an element of civil liability under the
 DMCA; even completely innocent violations (which is not the case here) are subject to civil
 liability. 17 U.S.C. § 1203(c)(5).

1 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). There are no disputed issues of material fact
 2 relevant to DMCA liability. The undisputed facts establish, as a matter, of law that 321 is liable
 3 under the DMCA.

4

5 **IV. 321 IS LIABLE UNDER THE ANTI-CIRCUMVENTION PROVISIONS OF THE**
DMCA

6

7 Section 1201(a)(2) of the DMCA provides:

8 “[n]o person shall manufacture, import, offer to the public, provide,
 9 or otherwise traffic in any technology, product, service, device,
 component, or part thereof, that:

10 (A) is primarily designed or produced for the purpose of
 11 circumventing a technological measure that effectively controls
 access to a work protected under this title;

12 (B) has only limited commercially significant purpose or use other
 13 than to circumvent a technological measure that effectively
 controls access to a work protected under this title; or

14 (C) is marketed by that person or another acting in concert with
 15 that person with that person's knowledge for use in circumventing a
 technological measure that effectively controls access to a work
 16 protected under this title. 17 U.S.C. § 1201(a)(2)

17

18 These “access protection” anti-circumvention provisions prohibit the electronic “equivalent [of]
 19 breaking into a castle.” 3 Nimmer, § 12A.03[D][1], at 12A-33; H.R. Rep. No. 105-551(I), at 17
 20 (1998) (“The act of circumventing a technological protection measure put in place by a copyright
 21 owner to control access to a copyrighted work is the electronic equivalent of breaking into a
 22 locked room in order to obtain a copy of a book”).

23 Section 1201(b)(1) provides:

24 “[n]o person shall manufacture, import, offer to the public, provide,
 25 or otherwise traffic in any technology, product, service, device,
 component, or part thereof, that:

26 (A) is primarily designed or produced for the purpose of
 27 circumventing protection afforded by a technological measure that
 effectively protects a right of a copyright owner under this title in a
 28 work or a portion thereof;

1 (B) has only limited commercially significant purpose or use other
 2 than to circumvent protection afforded by a technological measure
 3 that effectively protects a right of a copyright owner under this title
 in a work or portion thereof; or

4 (C) is marketed by that person or another acting in concert with
 5 that person with that person's knowledge for use in circumventing
 6 protection afforded by a technological measure that effectively
 protects a right of a copyright owner under this title in a work or
 portion thereof." 17 U.S.C. §1201(b)(1).

7
 8 Only one of the three enumerated conditions ("primarily designed or produced for the purpose of
 9 circumventing", "limited commercially significant purpose or use other than to circumvent," or
 10 "marketed ...for use in circumventing") in sections 1201(a)(2) or 1201(b)(1) need be satisfied in
 11 order to find a violation. See S. Rep. No. 105-190, at 29 ("For a technology, product, service,
 12 device, component, or part thereof to be prohibited under this subsection, ***one of three*** conditions
 13 must be met.") (emphasis added).

14 A. 321 Is Engaged In Conduct Prohibited By Sections 1201(a)(2) and 1201(b)

15 The manufacture and distribution of the DVD Circumvention Software violates both
 16 sections 1201(a)(2) and 1201(b)(1) of the DMCA.

17 *First*, the DVD Circumvention Software plainly is "technology" within the meaning of
 18 section 1201. See Reimerdes, 111 F. Supp.2d at 317 ("[A] computer program...unquestionably
 19 is 'technology' within the meaning of the statute.").

20 *Second*, CSS is a "technological measure" that both (1) "effectively controls access to a
 21 work protected under this title" and (2) "effectively protects a right of a copyright owner under
 22 this Title." "[A] technological measure 'effectively controls access to a work' if the measure, in
 23 the ordinary course of its operation, requires the application of information, or a process or
 24 treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C.
 25 §1201(a)(3)(B). Congress made clear that technological measures based on encryption or
 26 scrambling "effectively control" access to copyrighted works. Reimerdes, 111 F. Supp. 2d at
 27 318, citing H.R. Rep. No. 105-551(II) at 39 (1998). CSS prevents access to (i.e., use of) DVDs
 28 without the application of the proper CSS keys, so that a DVD cannot be played by any software

1 or hardware other than a licensed DVD player. Reimerdes, 111 F. Supp. 2d at 317-18 (“One
 2 cannot gain access to a CSS-protected work on a DVD without application of the three keys that
 3 are required by the software. One cannot lawfully gain access to the keys except by entering into
 4 a license with the DVD CCA under authority granted by the copyright owners or by purchasing a
 5 DVD player or drive containing the keys pursuant to such a license.”). See RealNetworks, Inc.
 6 v. Streambox, Inc., Case No. 2:99-CV-02070, 2000 WL 127311, *7 (W.D. Wash., Jan. 18, 2000)
 7 (software technology that limited access to and playback of digital media files in proprietary
 8 “RealMedia” format to plaintiff’s own media players was a technological measure that
 9 “effectively controls access”).

10 CSS also “effectively protects a right of a copyright owner under this title” because it “in
 11 the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right
 12 of a copyright owner under this title.” 17 U.S.C. § 1201(b)(2)(B). CSS prevents, among other
 13 things, the unauthorized *copying* of a DVD – a right reserved to the copyright owner. 17 U.S.C.
 14 §106(1); see RealNetworks, at *7 (software technology that prevented plaintiff’s media player
 15 from allowing users to copy digital media files designated as copy-protected effectively protects
 16 the right of a copyright owner to control the unauthorized copying of its work because it “may
 17 restrict others from exercising a copyright holder’s exclusive right to copy its work.”).

18 **Third**, the DVD Circumvention Software – and particularly the “part thereof” that
 19 accesses the DVD content and decrypts CSS while “ripping” the DVD – is (1) “primarily
 20 designed or produced for the purpose of circumventing” CSS, (2) “has only limited
 21 commercially significant purpose or use other than to circumvent” CSS, and (3) is marketed by
 22 321 for use in circumventing CSS. Sections 1201(a)(3) and 1201(b)(2) define “circumvention”
 23 as “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological
 24 measure.” The *only* purpose of the DVD Circumvention Software is to “avoid, bypass, remove,
 25 or deactivate” CSS protection and thereby to permit access to and copying of CSS-protected
 26 DVDs. See Reimerdes, 111 F. Supp. 2d at 319 (DeCSS software violated both 1201(a)(2) and
 27 1201(b)); RealNetworks, at *7-8 (“StreamBox VCR” software that improperly accessed
 28 restricted “RealMedia” files by emulating plaintiff’s media player and then allowed such files to

1 be copied “bypassed” the access control technology and “circumvented” the copy protection
 2 technology); Sony Computer Entertainment America Inc. v. GameMasters, 87 F. Supp.2d 976,
 3 987 (N.D. Cal. 1999) (“GameEnhancer” circumvented access control technology that permitted
 4 video game consoles to play only video games “when encrypted data is read from an authorized
 5 CD-Rom.”). Further, because DVDs **cannot be digitally copied without circumventing CSS**, the
 6 DVD Circumvention Software would not have any commercially significant purpose without its
 7 circumvention components. See RealNetworks, at *8 (no commercial purpose other than
 8 circumvention). Finally, the DVD Circumvention Software is marketed as a tool to copy CSS-
 9 protected DVDs. That the DVD Circumvention Software may contain elements or applications
 10 that perform functions other than circumvention (such as compressing or burning the protection-
 11 circumvented works) is not relevant, because 321's distribution of the circumvention elements
 12 alone subjects it to liability. See 17 U.S.C. §§ 1201(a)(2) and 1201(b) (“[n]o person shall
 13 manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product,
 14 service, device, component, **or part thereof...**”). See also RealNetworks, at *7 (“*[A]t least a*
 15 **part** of the Streambox VCR. . . . circumvents the Copy Switch, enabling a user to make a copy
 16 of a file that the copyright owner has sought to protect”).

17 B. None of the Exemptions Of Section 1201 is Applicable Here.

18 Section 1201 contains limited, specified exemptions for what otherwise would constitute
 19 unlawful trafficking in circumvention technology. None of these is applicable here. See 17
 20 U.S.C. §§ 1201(e) (law enforcement, intelligence and other governmental activities), 1201(f)(3)
 21 (information acquired through reverse engineering “solely for the purpose” of achieving
 22 interoperability of computer programs as defined in the statue)³, 1201(g)(4) (providing
 23 technological means of circumvention to another with whom one is working collaboratively in
 24 good faith encryption research), and 1201(j)(4) (certain acts of security testing).

25

26

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³ Section 1201(f)(3) “does not apply to public dissemination of the means of circumvention, as the legislative history confirms.” Reimerdes, 111 F. Supp. 2d at 320.

1 C. "Downstream" Uses of Unlawfully-Circumvented DVD Content Are Irrelevant to
 2 Section 1201 Liability

3 With no defense to its liability under the DMCA, 321 attempts to cloud the issue with
 4 arguments that "post-circumvention" uses made of the decrypted DVDs allegedly are lawful.
 5 See, e.g., FAC ¶¶ 32-34. 321 is wrong that such uses are lawful. However, these arguments are
 6 irrelevant to 321's liability. Section 1201 prohibits the very acts of *circumventing access*
 7 *controls and trafficking in circumvention technology*, both of which necessarily occur before
 8 the end user burns, distributes, or otherwise undertakes any action with respect to the unprotected
 9 DVD. For that reason, any argument by 321 that copying of CSS-protected DVDs by end users
 10 of its DVD Circumvention Software is "fair use," is a red herring. Fair use, 17 U.S.C. §107, is a
 11 defense *only* to actions for *copyright infringement*, and not to liability under *section 1201*. See
 12 Elcom, 203 F.Supp.2d at 1124 ("Nothing within the express language would permit trafficking in
 13 devices designed to bypass use restrictions in order to enable a fair use, as opposed to an
 14 infringing use. The statute does not distinguish between devices based on the uses to which the
 15 device will be put. Instead, all tools that enable circumvention of use restrictions are banned, not
 16 merely those use restrictions that prohibit infringement."); Reimerdes, 111 F.Supp.2d. at 322 ("If
 17 Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed,
 18 as the legislative history demonstrates, the decision not to make fair use a defense to a claim
 19 under Section 1201(a) was quite deliberate."); Copyright Office, Exemption to Prohibition on
 20 Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule
 21 (hereinafter, the "DMCA Rulemaking"), 37 CFR Part 201, 65 Fed. Reg. 64556-01, at 64561
 22 ("fair use ...is not a defense to the cause of action created by the anticircumvention prohibition
 23 of section 1201"); 2 I. Ballon, E-Commerce and Internet Law §22.02[4][D][ii], at 22-16
 24 ("Section 1201...is not limited by the fair use doctrine...").

25 V. THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA ARE NOT
 26 INVALID OR UNCONSTITUTIONAL

27 Each constitutional argument raised in the FAC is without merit and previously has been
 28 rejected. This result is not surprising. "Legislation prohibiting circumvention devices is not

1 unprecedented." S. Rep. 105-190, at 11-12 (noting that §1002(c) of the Copyright Act,
 2 §605(e)(4) of the Communications Act, and article 1707(b) of the NAFTA all involve
 3 prohibitions on circumvention devices). "Similar laws have been enacted in related contexts."
 4 Id. at 28 (noting the 47 U.S.C. § 553(a)(2) prohibition on the manufacture or distribution of
 5 equipment intended for the unauthorized reception of cable television service). Section 1201
 6 protects against trafficking in what essentially amounts to high-tech lock-picks. Id. at 11
 7 (describing the anti-circumvention provisions as "roughly analogous to making it illegal to break
 8 into a house using a tool, the primary purpose of which is to break into houses."); Corley, 273
 9 F.3d at 452 ("[W]e must recognize that the essential purpose of encryption code is to prevent
 10 unauthorized access. Owners of all property rights are entitled to prohibit access to their
 11 property by unauthorized persons. Homeowners can install locks on the doors of their houses.
 12 Custodians of valuables can place them in safes. Stores can attach to products security devices
 13 that will activate alarms if the products are taken away without purchase.").

14 A. Congress Did Not Exceed Its Constitutional Power in Enacting the DMCA

15 321 suggests that the DMCA is invalid because Congress "exceeded its enumerated
 16 powers under Article I, Section 8, of the United States Constitution." FAC ¶44. This suggestion
 17 is without merit: The Commerce Clause, Article I, Section 8, Clause 3, "grants Congress the
 18 power to regulate commerce with foreign nations, among the several States and with the Indian
 19 tribes," (H. Rep. No. 105-551 (II), at 35 (1998)), and "Congress plainly has the power to enact
 20 the DMCA under the Commerce Clause." Elcom, 203 F.Supp.2d at 1138.⁴ The Commerce
 21 Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its
 22

23

 24 ⁴ In Elcom, the Court also rejected the argument that Congress exceeded its authority
 25 under the Intellectual Property Clause, Art. 1, § 8, Cl. 8, when it enacted the DMCA. The Court
 26 reasoned that, if a statute is within Congress' Commerce power and is "not fundamentally
 27 inconsistent with" the Intellectual Property Clause, it is not an unconstitutional exercise of
 28 congressional power. 203 F. Supp. 2d at 1139-41. The Court concluded that the DMCA's anti-
 circumvention provisions were *not* "fundamentally inconsistent" with the Intellectual Property
 Clause, and that "preventing trafficking in tools that would enable widespread piracy and
 unlawful infringement is *consistent* with the Intellectual Property Clause's grant to Congress of
 the power to 'promote the useful arts and sciences' by granting exclusive rights to authors in their
 writings." Id. at 1140 (emphasis added).

1 utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

2 U.S. v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 9 Wheat 1, 196, 6 L. Ed. 23

3 (1824)). Under the Commerce Clause, Congress can, inter alia, regulate intrastate activities that

4 substantially affect interstate commerce. Id., at 558-59. The applicable test is "'whether a

5 rational basis existed for concluding that a regulated activity sufficiently affected interstate

6 commerce.'" Id. at 557. Such a basis clearly exists here.

7 In United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999), a defendant

8 charged with violating the "anti-bootlegging" statute (18 U.S.C. § 2319A), which, among other

9 things, criminalizes the unauthorized recording of live musical performances, challenged

10 Congress' power to enact the legislation. Id. at 1271. The Court examined whether the

11 Commerce Clause provided Congressional power for the enactment, and concluded that the

12 required nexus with commerce easily was established:

13 "The link between bootleg compact discs and interstate commerce

14 and commerce with foreign nations is self-evident. . . . Bootleggers

15 depress the legitimate markets because demand is satisfied through

16 unauthorized channels. Generally speaking, performing artists

17 who attract bootleggers are those who are sufficiently popular that

18 their appeal crosses state or national lines. The very reason

19 Congress prohibited this conduct is because of the deleterious

20 economic effect on the recording industry. The specific context in

21 which [the anti-bootlegging statute] was enacted involved a treaty

22 with foreign nations, called for by the World Trade Organization,

23 whose purpose was to ensure uniform recognition and treatment of

24 intellectual property in international commerce. The context

25 reveals that the focus of Congress was on interstate and

26 international commerce. . . . Moreover, the type of conduct that

27 Congress intended to regulate by passing the anti-bootlegging

28 statute is by its very nature economic activity." Id. at 1276-77.

23 The conduct regulated by the DMCA has a near-identical nexus with commerce, and one

24 that is more than sufficient to validate Congressional power for the enactment. The Court in

25 Elcom specifically considered this issue:

26 "The DMCA prohibits conduct that has a substantial effect on

27 commerce between the states and commerce with foreign nations.

28 Trafficking in or the marketing of circumvention devices 'for gain,'

29 as proscribed by [Section 1201] has a direct effect on interstate

30 commerce. To the extent that circumvention devices enable

31 wrongdoers to engage in on-line piracy by unlawfully copying and

distributing copyrighted works of authorship, the sale of such devices has a direct effect on suppressing the market for legitimate copies of the works. Accordingly, there is a rational basis for concluding that the regulated activity sufficiently affects interstate commerce to establish that Congress had authority under the Commerce Clause to enact the legislation." Elcom, 203 F.Supp.2d at 1138.

The DMCA legislative history reflects that it was developed out of “a wide-ranging review of all issues” relating to electronic commerce (which Congress felt was “having a profound impact on the nation’s economy”), and a concern about products with the potential to harm the developing market for digital content. H. Rep. No. 105-551 (II), at 22. Although “the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise,” Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948), legislative findings “are normally helpful to a court in finding an interstate commerce nexus.” Moghadam, 175 F.3d at 1275 (citing Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995)). Such findings are entitled to “substantial deference.” Turner Broad. Sys., Inc., v. FCC, 520 U.S. 180, 195 (1997); Moghadam, 175 F.3d at 1275 (citing United States v. Viscome, 144 F.3d 1365, 1371 (11th Cir. 1998)). Faced with the ease by which widespread Internet access could facilitate the unlawful copying and distribution of digital media in orders of magnitude previously unseen, Congress chose to regulate this aspect of electronic commerce by enacting the DMCA and, specifically, section 1201. See S. Rep. No. 105-190, at 8 (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”). Because a “rational basis” exists “for concluding that a regulated activity sufficiently affected interstate commerce,” Lopez, 514 U.S. at 557, Congress properly exercised its power under the Commerce Clause. Moghadam, 175 F.3d at 1275.

B. The DMCA Does Not Conflict With Or Otherwise Eliminate Fair Use

26 Like other defendants who unsuccessfully have challenged the DMCA, 321 likely will
27 argue that "fair use" is a constitutional mandate that the DMCA unconstitutionally "eliminates."
28 Both prongs of this argument are wrong. Fair use is not constitutionally-based.

1 “Asserting that fair use ‘is rooted in and required by both the
 2 Copyright Clause and the First Amendment...the Appellants
 3 contend that the DMCA, as applied by the District Court,
 4 unconstitutionally eliminates ‘fair use’ of copyrighted materials.
 5 We reject this extravagant claim....[T]he Supreme Court has never
 6 held that fair use is constitutionally required.” Corley, 273 F.3d at
 7 458.

8 Nor does the DMCA “eliminate” fair use; to the contrary, Section 1201(c)(1) expressly provides
 9 that “[n]othing in this section shall affect . . . defenses to copyright infringement, including fair
 10 use.” While the fair use doctrine may insulate certain limited uses of a copyrighted work from
 11 liability for copyright infringement, it never has been held to guarantee either access to a
 12 copyrighted work or copying of that work by the user’s “preferred technique.”

13 “We know of no authority for the proposition that fair use, as
 14 protected by the Copyright Act, much less the Constitution,
 15 guarantees copying by the optimum method or in the identical
 16 format of the original. . . . Fair use has never been held to be a
 17 guarantee of access to copyrighted material in order to copy it by
 18 the fair user’s preferred technique or in the format of the original.
 19 The fact that the resulting copy will not be as perfect or as
 20 manipulable as a digital copy obtained by having direct access to
 21 the DVD movie in its digital form, provides no basis for a claim of
 22 unconstitutional limitation of fair use.” Corley, 273 F.3d at 459.

23 See also Elcom, 203 F.Supp.2d at 1125. (“Congress’ expressed intent to preserve the right of fair
 24 use is not inconsistent with a ban on trafficking in circumvention technologies, even those that
 25 could be used for fair use purposes rather than infringement. Fair use of a copyrighted work
 26 continues to be permitted . . . even though engaging in certain fair uses of digital works may be
 27 made more difficult if tools to circumvent use restrictions cannot be readily obtained.”); DMCA
 28 Rulemaking at 64569 (“there is no unqualified right to access works on any particular machine
 29 or device of the user’s choosing.”).

30 Congress even enacted an additional “fail-safe” mechanism to assure that the DMCA
 31 would be flexible enough to adapt to and account for any unreasonable restraints on fair use that
 32 might arise in practical application. Thus, the DMCA requires a triennial rulemaking review by
 33 the Copyright Office to consider the need for additional exemptions. 17 U.S.C. § 1201(a)(1).
 34 On October 27, 2002, the Copyright Office concluded its first review during which it specifically
 35 considered – ***and rejected*** – the suggestion that CSS encryption technology had an adverse

1 impact on the ability of users to make lawful uses of DVD motion pictures.⁵ DMCA
 2 Rulemaking, at 64567-70. It found the contrary to be true: "it appears clear from the evidence
 3 that the *circumvention* of technological measures would be likely to have an adverse effect on
 4 the availability of digital works on DVDs to the public." *Id.*, at 64570.

5 C. Section 1201 Does Not Violate the First Amendment

6 Although it is perhaps questionable whether true "speech" is implicated by 321's conduct
 7 in trafficking in the DVD Circumvention Software, courts have held that "[c]omputer software is
 8 expression that is protected by the copyright laws and is therefore 'speech' at some level, speech
 9 that is protected at some level by the First Amendment." Elcom, 203 F.Supp.2d 1126. See also
 10 Corley, 273 F.3d at 454. Accepting, arguendo, that the DVD Circumvention Software is
 11 protectable speech, it is clear that the DMCA is content-neutral, furthers important governmental
 12 interests, and is sufficiently tailored to further those interests.

13 1. **The DMCA Is Content-Neutral**

14 "[T]he scope of protection for speech generally depends on whether the restriction is
 15 imposed because of the content of the speech." Corley, 273 F.3d at 450. "Content-based
 16 restrictions are permissible only if they serve compelling state interests and do so by the least
 17 restrictive means available." *Id.* (citing Sable Communications of California, Inc. v. FCC, 492
 18 U.S. 115, 126 (1989)). "A content-neutral restriction is permissible if it serves a substantial
 19 governmental interest, the interest is unrelated to the suppression of free expression, and the
 20 regulation is narrowly tailored." *Id.* A law is narrowly-tailored when "the means chosen do not
 21 'burden substantially more speech than is necessary to further the government's legitimate
 22 interests.'" Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting Ward v.
 23 Rock Against Racism, 491 U.S. 781, 799 (1989)); Corley, 273 F.3d at 450.

24 Circumvention software is not pure speech. In its key respects, it is functional, thereby
 25 necessitating an analysis that severs the software's expressive aspects from these functional

26 ⁵ The Copyright Office noted that "[m]ore comments and testimony were submitted on
 27 the subject of motion pictures on digital versatile discs (DVDs) and the technological measures
 28 employed on DVDs, primarily Content Scramble System ("CSS"), than on any other subject in
 this rulemaking." DMCA Rulemaking at 64567.

1 elements. "When speech and non-speech elements are combined in a single course of conduct, a
 2 sufficiently important government interest in regulating the non-speech element can justify
 3 incidental intrusions on First Amendment freedoms." Elcom, 203 F. Supp. 2d at 1127-28 (citing
 4 United States v. O'Brien, 391 U.S. 367 (1968)); Junger v. Daley, 209 F.3d 481, 485 (6th Cir.
 5 2000)). Because "computer code can instantly cause a computer to accomplish tasks and
 6 instantly render the results of those tasks available throughout the world via the Internet," and
 7 "[t]he only human action required to achieve these results can be as limited and instantaneous as
 8 a single click of a mouse," the "realities of what code is and what its normal functions are require
 9 a First Amendment analysis that treats code as combining nonspeech and speech elements, *i.e.*,
 10 functional and expressive elements." Corley, 273 F.3d at 451. Accordingly, "the capacity of a
 11 decryption program like DeCSS to accomplish unauthorized – indeed, unlawful – access to
 12 materials in which the Plaintiffs have intellectual property rights must inform and limit the scope
 13 of its First Amendment protection." Id. at 453.

14 Section 1201 prohibitions are aimed at the functional conduct of circumvention devices
 15 without regard to the viewpoint of the expression -- the "content" is irrelevant. "The principal
 16 inquiry in determining whether a statute is content-neutral is whether the government has
 17 adopted a regulation of speech because of agreement or disagreement with the message it
 18 conveys." Elcom, 203 F. Supp. 2d at 1128 (citing Ward, 491 U.S. at 791). It is clear from the
 19 plain text of Section 1201, as well as from its legislative history, that Congress had no intention
 20 to regulate expressive content, but rather sought to protect copyrighted works in digital form
 21 from rapid and viral copying and distribution. 17 U.S.C. § 1201; see Reimerdes, 111 F.Supp.2d
 22 at 329 ("The reason that Congress enacted the anti-trafficking provision of the DMCA had
 23 nothing to do with suppressing particular ideas of computer programmers and everything to do
 24 with functionality."); Corley, 273 F.3d at 454.⁶ As Congress did not enact the DMCA because of
 25 any agreement or disagreement with any particular message, the DMCA is content-neutral.

26

27 ⁶ Because the DMCA does not, by its terms, regulate spoken words or expressive
 28 content, 321 cannot argue that the DMCA is facially overbroad. Elcom, 203 F.Supp at 1133
 (rejecting challenge that DMCA was facially overbroad because it infringed alleged First

1 "Here, the parties have pointed to no portion of the legislative
 2 history that demonstrates a congressional intent to target speech
 3 because of its expressive content. Rather, Congress sought ways to
 4 further electronic commerce and protect intellectual property
 5 rights, while at the same time protecting fair use. In order to
 balance these priorities, Congress sought to ban trafficking in any
 technology or device that could be used to circumvent
 technological restrictions that served to protect the rights of
 copyright owners." Elcom, 203 F.Supp.2d at 1128.

6 **2. The DMCA Promotes Substantial Governmental Interests And Is
 7 Tailored To Further Those Interests**

8 Because the provisions of the DMCA are content-neutral, "intermediate" scrutiny applies
 9 to any First Amendment challenge. Elcom, 203 F.Supp.2d at 1129 ("the court concludes that
 10 intermediate scrutiny, rather than strict scrutiny, is the appropriate standard to apply."); Corley,
 11 273 F.3d at 454 ("[Section 1201] is. . . .content-neutral, just as would be a restriction on
 12 trafficking in skeleton keys, identified because of their capacity to unlock jail cells"). Under
 13 "intermediate" scrutiny, a regulation:

14 "will be sustained if it furthers an important or substantial
 15 governmental interest; if the governmental interest is unrelated to
 16 the suppression of free expression; and if the incidental restriction
 17 on alleged First Amendment freedoms is no greater than is
 18 essential to the furtherance of that interest. To satisfy this standard,
 19 a regulation need not be the least speech-restrictive means of
 20 advancing the Government's interests. Rather, the requirement of
 narrow tailoring is satisfied so long as the regulation promotes a
 substantial governmental interest that would be achieved less
 effectively absent the regulation." Turner, 512 U.S. at 680
 (quoting O'Brien, 391 U.S. at 377; Ward, 491 U.S. at 799, internal
 quotations omitted).

21
 22 "The Government's interest in preventing unauthorized access to encrypted copyrighted
 23 material is unquestionably substantial, and the regulation of DeCSS . . . plainly serves that
 24 interest." Corley, 273 F.3d at 454. Congress had at least two important governmental interests
 25 in enacting the DMCA: (1) preventing the unauthorized access, copying, and distribution of

26
 27 Amendment rights of third parties: "facial attacks on overbreadth grounds are limited to
 28 situations in which the statute or regulation by its terms regulates spoken words or expressive
 conduct.")

1 copyrighted works, and (2) promoting the development of electronic commerce. See H. Rep.
 2 No. 105-551 (II), at 23 (1998) ("The debate on this legislation highlighted two important
 3 priorities: promoting the continued growth and development of electronic commerce; and
 4 protecting intellectual property rights"); S. Rep. No. 105-190, at 8 (1998) ("Due to the ease with
 5 which digital works can be copied and distributed worldwide virtually instantaneously, copyright
 6 owners will hesitate to make their works readily available on the Internet without reasonable
 7 assurance that they will be protected against massive piracy"). "These governmental interests
 8 are both legitimate and substantial." Elcom, 203 F.Supp.2d at 1130.

9 Section 1201 is tailored to achieve these important governmental interests: "Without the
 10 ban on trafficking in circumvention tools, the government's interest in promoting electronic
 11 commerce, preserving the rights of copyright holders, and preventing piracy would be
 12 undermined. The absence of effective technological restrictions to prevent copyright
 13 infringement would inevitably result in even more rampant piracy, with a corresponding likely
 14 decrease in the willingness of authors and owners of copyrighted works to produce them in
 15 digital form or make the works available on-line." Id. "[T]he DMCA does not burden
 16 substantially more speech than is necessary to achieve the government's asserted goals of
 17 promoting electronic commerce, protecting copyrights, and preventing electronic piracy." Id. at
 18 1132 (citing O'Brien, 391 U.S. at 367); Corley, 273 F.3d at 454-55 (prohibition on dissemination
 19 of DeCSS does not burden more speech than necessary).

20 D. Section 1201 Is Not Unconstitutionally Vague

21 The mandate of section 1201 could not be clearer: trafficking in technology primarily
 22 designed to circumvent access or copying protection is unlawful. Liability under section 1201
 23 does not require knowledge of the uses an alleged trafficker's customers might make of the
 24 technology, and liability does not turn on whether those customers intend or actually do make
 25 "fair" or socially acceptable uses. Section 1201 expressly prohibits *all* trafficking in anti-
 26 circumvention devices. Elcom, 203 F.Supp. 2d at 1124.

27 The specific language of section 1201 also is clear. In Elcom, the Court considered and
 28 upheld the "primarily designed" and "marketed for use" phrases in section 1201, 203 F.Supp.2d

1 at 1137 ("the primarily designed for' and 'marketed for use' language is not unconstitutionally
 2 vague"), and courts repeatedly have upheld this language in other statutes. See Village of
 3 Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 500-03 (1982) ("designed
 4 for" and "marketed primarily for use" drug law was not unconstitutionally vague); Posters 'N'
 5 Things, Ltd. v. United States, 511 U.S. 513 (1994) ("primarily intended ... for use" drug law was
 6 not unconstitutionally vague); Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681,
 7 685-86 (2d Cir. 1996) ("designed for" gun law was not unconstitutionally vague).

8 In fact, all of the operative language of Section 1201 is specifically defined. 17 U.S.C.
 9 §§ 1201 (a)(3) (defining "circumvent a technological measure," and "effectively controls access
 10 to a work"); 1201 (b)(2) (defining "circumvent protection afforded by a technological measure,"
 11 and "effectively protects a right of a copyright owner under this title"). Taken together, these
 12 definitions ensure that "the DMCA's prohibition on trafficking in technologies that circumvent
 13 use and copy restrictions is sufficiently clear to withstand a vagueness attack." Elcom, 203
 14 F.Supp.2d at 1137 (referring to the Section 106 and 107 definitions as well as those contained in
 15 Section 1201 in rejecting a void-for-vagueness argument).

16 **VI. 321 SHOULD BE ENJOINED FROM MANUFACTURING, DISTRIBUTING, OR**
 17 **OTHERWISE TRAFFICKING IN THE DVD CIRCUMVENTION SOFTWARE**

18 Section 1203(b) provides: "In an action brought under [the DMCA], the court. . . may
 19 grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or
 20 restrain a violation." In Reimerdes, the Court held that "injunctive relief is appropriate if there is
 21 a reasonable likelihood of future violations absent such relief," and the plaintiffs lack an
 22 adequate remedy at law. 111 F.Supp.2d at 343. Both elements are present here. 321 continues
 23 to traffic in the DVD Circumvention Software, notwithstanding (1) the plain language of the
 24 statute prohibits the circumvention of technological protection measures; (2) 321's knowledge
 25 that the Second Circuit already has found liability for circumventing CSS protection; and (3)
 26 every court that has considered 321's constitutional challenges has rejected them. 321's attitude
 27 was voiced by its president: "[w]hether we knew or didn't know we were breaking the law was
 28 irrelevant." Mayer Decl., Ex. D. And, an injunction is necessary because the Studios have no

1 adequate remedy at law. The further dissemination of the DVD Circumvention Software would
 2 have far-reaching, serious consequences for the ongoing viability of the DVD medium.

3 “Copyright and, more broadly, intellectual property piracy are
 4 endemic, as Congress repeatedly has found. The interest served by
 5 prohibiting means that facilitate such piracy – the protection of the
 6 monopoly granted to copyright owners by the Copyright Act – is of
 7 constitutional dimension. There is little room for doubting that
 8 broad dissemination of DeCSS would seriously injure or destroy
 9 plaintiffs' ability to distribute their copyrighted products on DVDs
 10 and, for that matter, undermine their ability to sell their products to
 11 the 'home video' market in other forms. The potential damages
 12 probably are incalculable....” Reimerdes, 82 F. Supp. 2d at 225-
 13 26.

14 See also, DMCA Rulemaking at 64570 (“it appears clear from the evidence that the
 15 circumvention of technological protection measures would be likely to have an adverse effect on
 16 the availability of digital works on DVDs to the public.”).

17

18

CONCLUSION

19 Each of the three courts that has ruled on the DMCA's anti-circumvention provisions has
 20 considered the very issues that 321 asserts here. Each time, the court upheld the constitutionality
 21 of the DMCA, in thoughtful opinions, whose reasoning, we submit, is equally persuasive here.
 22 321's admitted conduct (and the results of its conduct) are no different from that of the other
 23 traffickers whose challenges to the DMCA were rejected. Because there are no material issues
 24 of fact, the Studios respectfully request that the Court grant the motion for partial summary
 25 judgment and issue the requested injunction, and dismiss as moot 321's Second Claim for
 26 Declaratory Relief.

27

DATED: January 10, 2003

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